ZAIDAH ISMAIL v. INSPEKTOR RABIATUL ADAWIAYAH MOHD NOOR & ORS AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
LAU BEE LAN JCA
VAZEER ALAM MYDIN MEERA JCA
MOHD SOFIAN ABD RAZAK JCA
[CIVIL APPEAL NOS: T-01(NCVC)(W)-108-03-2019
& T-01(NCVC)(W)-748-12-2019]
22 OCTOBER 2021

CIVIL PROCEDURE: *Action – Tort – Unlawful arrest and detention – Claim for – First plaintiff arrested and remanded for human trafficking – Whether police report disclosed any offence under s. 13(a) to (h) of Anti-Trafficking in Persons and Smuggling of Migrants Act 2007 ('ATIPSOM') against first plaintiff – Whether first plaintiff committed seizable offence under ATIPSOM – Whether arrest, detention and investigation done with reasonable and probable cause – Whether defendants wrongly or exceedingly used powers with bad faith in arresting and investigating first plaintiff – Whether defendants acted within provisions of s. 23(1)(a) of Criminal Procedure Code ('CPC') and s. 29 of ATIPSOM – Whether defendant followed strictly requirements stipulated in s. 117 of CPC – Whether arrest and detention lawful – Whether defendants liable for damages*

TORT: *Damages – Unlawful arrest and detention – First plaintiff arrested and remanded for human trafficking – Whether police report disclosed any offence under s. 13(a) to (h) of Anti-Trafficking in Persons and Smuggling of Migrants Act 2007 ('ATIPSOM') against first plaintiff – Whether first plaintiff committed seizable offence under ATIPSOM – Whether arrest, detention and investigation done with reasonable and probable cause – Whether defendants wrongly or exceedingly used their powers with bad faith in arresting and investigating first plaintiff – Whether defendants acted within provisions of s. 23(1)(a) of Criminal Procedure Code ('CPC') and s. 29 of ATIPSOM – Whether defendant followed strictly requirements stipulated in s. 117 of CPC – Whether arrest and detention lawful – Whether defendants liable for damages*

The plaintiffs' claim was for wrongful detention. This whole case started when one Budi Hermawan ('Budi'), an Indonesian national employed by the first plaintiff with valid documentation, had lodged a police report complaining that he had been beaten and assaulted by the second plaintiff. The first plaintiff was called by the police instructing her to bring her other Indonesian employees. The first plaintiff brought three of her employees and they were allowed to return after having their statements recorded. Subsequently, the second defendant recorded Budi's statement and her investigation revealed some material facts which formed the basis to initiate investigations under s. 13(f) of the Anti-Trafficking in Persons and Smuggling of Migrants Act 2007 ('ATIPSOM'). The second defendant suspected that

A Budi was a trafficked person and a police report was lodged to investigate Budi's complaints. Subsequently, the second plaintiff was arrested by the police pursuant to a report lodged by Budi alleging that he had been hurt by the second plaintiff. The first plaintiff was also arrested for human trafficking and remanded. After being detained for seven days, the first plaintiff was
B released on bail. The second plaintiff was charged at the Magistrate's Court for an offence under s. 323 of the Penal Code and was granted a discharge not amounting to an acquittal (DNAA). The plaintiffs, alleging unlawful arrest and detention which had affected them mentally and physically, brought this action and claimed damages. After a full trial, the High Court
C Judge ('HCJ') found that the detention was lawful but allowed the first plaintiff's prayer for damages and made an order against the defendants, *inter alia*, for the defendants to pay damages to the first plaintiff. Aggrieved by the decision of the High Court, the defendants appealed in Appeal No 748. The first plaintiff also appealed against part of the decision on the issue of quantum of the damages in Appeal No 108. The plaintiffs argued (i) during
D the remand, the plaintiffs claimed that the defendants had imposed mental and physical torture without valid reasons and with *mala fide* in their actions; and (ii) that the plaintiffs' wrongful search, arrest and detention by the defendants was against art. 5(1) of the Federal Constitution ('FC') as it was not in accordance to the law. The defendants were wrong pertaining to the
E arrest without warrant whereby the plaintiffs claimed that it did not follow the procedures laid down in s. 23(1)(a) of the Criminal Procedure Code ('CPC'). The defendants, on the other hand, submitted (i) the defendants had classified the plaintiffs' case for investigation of an offence under the ATIPSOM and that all the investigations and arrests were conducted in
F accordance to the law. The arrest and detention were lawful on the reason that the defendants were given power to arrest without warrant pursuant to s. 29 of the ATIPSOM and s. 23(1)(a) of the CPC; (ii) under s. 29(1)(b) of the ATIPSOM, to justify the arrest without warrant, the defendants only need to prove that there was reasonable suspicion of the plaintiffs being
G engaged in committing or attempting to commit or abetting the commission of an offence under the ATIPSOM; (iii) the first information report ('FIR') had disclosed a reasonable suspicion that the element of slavery or force labour existed with the presence of beating which happened on a few occasions and the first plaintiff's failure to pay Budi's wages for three months;
H (iv) there was no fact to show that the acts of the defendants were oppressive and done with the intention to injure the first plaintiff; and (v) since the arrest and detention were lawful, the defendants should not be held liable for any pain and sufferings of the first plaintiff. The issues that arose in these appeals were (i) whether the arrest, detention and investigation were done with reasonable and probable cause; (ii) whether the defendants had wrongly or

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exceedingly used their powers with bad faith in arresting and investigating the first plaintiff; and (iii) whether the defendants were liable for damages in consequence of all acts done by the defendants against the first plaintiff. A

Held (allowing Appeal No 108; dismissing Appeal No 748)
Per Mohd Sofian Abd Razak JCA delivering the judgment of the court: B

(1) The police report made by Budi did not disclose any offence under s. 13(a) to (h) of the ATIPSOM against the first plaintiff. Budi was at the material time employed by the plaintiff with a proper and valid work permit issued by the Labour Department and the Immigration Department. The defendants did not challenge or verify this assertion. There was no basis to complain that he was not paid for more than three or four months. It was also not disputed through the evidence of the first defendant that Budi would be paid on per job basis, meaning that he would be paid once the weaving of the songket was completed. There was also no material before the court that Budi and the other four Indonesian workers employed by the first plaintiff were forced or coerced into working with the first plaintiff by fraud, deception or under any of the items stipulated in s. 13(a) to (h) of the ATIPSOM. (paras 38 & 39) C D

(2) There was evidence to show that it was the Indonesian employees of the first plaintiff who had created a sense of mistrust in the relationship between employer and employees, and this included Budi. This could be seen from the incident prior to the date of the alleged ill treatment reported by Budi. The first plaintiff had made a police report against four of her employees who were given leave to go to Johor Bahru but failed to come back for work after their leave had expired. The first defendant as an investigating officer failed to take into account the earlier police report made by the first plaintiff with regard to the four Indonesian workers. Had the first defendant considered the prior report lodged by the first plaintiff, it would show that the police report made by Budi was unfounded or at the very least not credible and was made with malice or ulterior intent. (paras 40 & 41) E F G

(3) There was no necessity for the police to arrest and detain the first plaintiff as there was nothing to implicate the first plaintiff with any offence under the ATIPSOM. At best, the first plaintiff should be categorised as a potential witness on possible charges to be preferred against the second plaintiff. The second plaintiff was charged under s. 323 of the Penal Code but was subsequently given a DNAA by the prosecution. In the police report made by Budi, there was no mention that the first plaintiff had slapped and scolded Budi. The first defendant being the investigating officer ought to have objectively analysed the facts to make a proper and valid judgment that it was unnecessary to H I

arrest and detain the first plaintiff. There was no credible information before the first defendant for any reasonable suspicion to arise that the first plaintiff had committed a seizable offence under ATIPSOM, or for that matter under any other statute. Budi was legally in the country with full and valid documents of employment by the first plaintiff. Therefore, it begged the question how the first defendant could have deduced that Budi was a person who had been trafficked into the county and thus be an offence for which the powers of arrest under s. 29 of the ATIPSOM or s. 23 of the CPC could be exercised. The complaint of alleged assault was made by Budi against the second plaintiff, and that too was a non-seizable offence. No reasonable complaint had been made or credible information had been received or a reasonable suspicion existed for the first plaintiff to be arrested and detained in respect of a seizable offence. (paras 42-45)

(4) There was ample and sufficient evidence to conclude that the first plaintiff's arrest and detention was unlawful. The police report lodged by Budi did not specifically refer to the first plaintiff and the assault claimed by Budi was allegedly perpetrated by the second plaintiff. There was nothing apparent that could be construed as an 'exploitation' as envisaged in s. 2 of the ATIPSOM, be it in the form of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs. It is perfectly within the power of the police to investigate the alleged crime committed but the issue at hand, given the scenario, was whether it was necessary for the police to have arrested and detained the first plaintiff when it was shown that the report by Budi was directed at the second plaintiff and not at the first plaintiff. There is an exercise of discretion in s. 29 of the ATIPSOM whether the police may arrest the first plaintiff with or without warrant. And that discretion must be exercised in accordance to the law. In order words, there was no necessity for the police to arrest the first plaintiff for purposes of investigation. The first plaintiff had indicated her willingness and cooperation in the investigation and had indeed fully cooperated with the police. (paras 49-54)

(5) Section 23 of the CPC and s. 29 of the ATIPSOM are relevant with regard to the powers of a police officer to arrest without an order of a Magistrate or without a warrant. In this regard, whether the arrest and detention of the first plaintiff was wrongful would very much depend on whether the defendant had acted within the provisions of s. 23(1)(a) of the CPC and/or s. 29 of the ATIPSOM. In order for the defendant to rely on that section, the defendant had to show they had reasonable or probable cause to effect the arrest in that the defendant had received

credible information or held reasonable suspicion as to the commission of an offence. A similar criterion applied when applying for a remand order to facilitate further investigation. With regard to the arrest of the first plaintiff, there was sufficient credible information available to the first defendant at the material time when the first plaintiff gave her statement to the first defendant and also in light of the earlier report made by the first plaintiff and the report made by Budi would show that the first plaintiff had not committed any offence under s. 13(1)(a-h) of the ATIPSOM or under s. 323 of the Penal Code, or for that matter any seizable offence. Hence, there was no credible information or reasonable suspicion that the first plaintiff was a "person who has been concerned in any offence committed anywhere in Malaysia which is a seizable offence under any law in force in that part of Malaysia in which it was committed or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned." The exercise of the power of arrest under s. 29 of the ATIPSOM or s. 23(1)(a) of the CPC is discretionary. The first defendant could have asked the first plaintiff to come to assist in the investigation at any time when required. Even if there was a dispute as to the payment of salary, it was a contractual dispute between Budi and the first plaintiff, and was not indicative of the commission of any criminal offence for which the power of arrest was exercised for the purposes of investigations. The evidence was aplenty in support of the first plaintiff's case. (paras 62-65)

(6) As for the application for the first and second remand orders, no application was made by the first plaintiff to challenge the validity of the remand order by the Magistrate. The court was not prevented from examining the evidence in the appeal record and make its own finding as the appeal was considered as a re-hearing. As for the application for the second remand order, the extension of remand for the first plaintiff, the first defendant as an investigating officer, did not tick or indicate under which reasons the application for extension for remand was made. Clearly the first defendant did not follow strictly the requirements as stipulated in s. 117 of the CPC. (paras 70 & 71)

Case(s) referred to:

Hassan Marsom & Ors v. Mohd Hady Ya'akop [2018] 7 CLJ 403 FC ***(refd)***
In Re The Detention Of S Sivarasa & Ors [1997] 1 CLJ 471 HC ***(refd)***
Masa Nangkai & Ors v. Sgd Edwin Nancha & Anor [2004] 1 LNS 495 HC ***(refd)***

Legislation referred to:

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, ss. 2, 13(a), (b), (c), (d), (e), (f), (g), (h), 29(1)(b)
Criminal Procedure Code, ss. 23(1)(a), (b), 117, 119
Federal Constitution, art. 5(1)
Penal Code, s. 323
Police Act 1967, s. 32

For the appellants - Nordin Kassim, R Jayasingam & Ng Keng Yang; M/s Nordin Kassim & Aziz

For the respondents - Iznan Ishak, Syahriah Shapiee & Mohd Ashraf Abd Hamid; AG's Chambers

[Editor's note: Appeal from High Court, Kuala Terengganu; Civil Application No: TA-22NCVC-43-11-2015 (overruled in part).]

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Sofian Abd Razak JCA:

Introduction

[1] There are two appeals before this court emanating from the decisions of the High Court dated 4 February 2019 and were heard together namely:

(i) Civil Appeal No: T-01(NCVC)(W)-108-03-2019 ("Appeal No. 108"), the appellant is the first plaintiff in the High Court and the respondents are the defendants. The appellant is appealing against part of the decision of the learned High Court Judge ("the learned HCJ") on the quantum of damages; and

(ii) Civil Appeal No: T-01(NCVC)(W)-748-12-2019 ("Appeal No. 748"), the appellants are the defendants and the respondents are the plaintiffs in the High Court. The appellants are appealing against the whole decision of the learned HCJ in allowing the plaintiffs' claim for damages.

[2] For ease of reference, the parties will be referred to as they were in the proceedings before the High Court.

[3] Having considered the appeal records and the submissions of the parties in these appeals, it is our unanimous decision that Appeal No. 108 is allowed with costs and Appeal No. 748 is dismissed with costs. We append herewith the reasons for our decision.

Background Facts

[4] Plaintiffs' claim is for wrongful detention. This whole case started when one Budi Hermawan ("Budi") an Indonesian national (passport: A 1505468) employed by the first plaintiff with valid documentation had fled his house and lodged a police report complaining that he had been beaten and assaulted by the second plaintiff on 6 April 2013.

[5] The first plaintiff who was worried that Budi had gone missing then called the police and was told that Budi was receiving treatment at a hospital. Subsequently, the police recorded the first plaintiff's statement on the night of 6 April 2013.

[6] On 7 April 2013, the first plaintiff was called again by the police instructing her to bring her other Indonesians employees. The first plaintiff brought three of her employees and they were allowed to return after having their statements recorded.

[7] On 8 April 2013 at around 9.28am, the second defendant recorded Budi's statement. Her investigation revealed some material facts which formed the basis to initiate investigation under sub-s. 13(f) of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ("Act 670"). The second defendant suspected that Budi was a trafficked person. A police report was lodged to investigate Budi's complaints.

[8] Subsequent to that, the second plaintiff, who is the younger brother of the first plaintiff, was arrested by a team of police officers at around 3.30pm on 8 April 2013 pursuant to a report lodged by Budi alleging that he had been hurt by the second plaintiff. On the same day, the first plaintiff was arrested for human trafficking and remanded. After being detained for seven days, the first plaintiff was released on bail on 15 April 2013.

[9] The second plaintiff was charged at the Magistrates' Court at Kuala Terengganu for an offence under s. 323 of the Penal Code. However, on 31 April 2015, the Magistrates' Court granted a discharge not amounting to an acquittal (DNAA) against the second plaintiff. The plaintiffs alleging unlawful arrest and detention which had affected them mentally and physically brought this action and claimed damages.

[10] Plaintiffs, in para. 19 of the statement of claim prayed as in the following:

(a) Pampasan ganti rugi ke atas tekanan mental dan fizikal, kehilangan pendapatan, reputasi terjejas, halangan dan kesusahan yang dialami pada kadar yang akan ditaksirkan;

(b) Pampasan ganti rugi atas penangkapan dan penahanan yang salah dan tidak sah pada kadar yang akan ditaksirkan;

(c) Ganti rugi teladan;

(d) Kos tindakan ini pada kadar peguam cara dan klien; dan

(e) Lain-lain perintah dan relief yang difikirkan adil dan suai manfaat oleh Mahkamah yang Mulia ini.

[11] After a full trial, on 4 February 2019, the learned HCJ found that the detention was lawful. The court however allowed the first plaintiff's prayer for damages and had made an order against the defendants as follows:

(a) Defendan-Defendan hendaklah membayar Ganti rugi Am ke atas Plaintif Pertama di atas tekanan mental dan fizikal, kehilangan pendapatan, reputasi terjejas, halangan dan kesusahan yang dialami yang akan ditaksirkan oleh Pendaftar Mahkamah;

A (b) Tahanan dan tangkapan adalah teratur dan permohonan untuk salah tahan dan salah tangkap ditolak;

(c) Defendan-Defendan hendaklah membayar kepada Plaintif Pertama wang sebanyak RM100,000.00 sebagai Ganti rugi Teladan; dan

(d) Defendan-Defendan hendaklah membayar kos sebanyak B RM15,000.00 kepada Plaintif Pertama.

[12] Thus, aggrieved by the decision of the High Court, the defendants appealed against such decision in Appeal No. 748. The first plaintiff also appealed against part of the decision on the issue of quantum of the damages in Appeal No. 108.

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The Plaintiffs' Case

[13] The plaintiffs in their submission had argued as follows:

(i) during the remand, the plaintiffs claimed that the defendants had imposed mental and physical torture without valid reasons and with D *mala fide* in their actions. Lists of the wrongful actions by the defendants can be found in para. 17 of the statement of claim; and

(ii) that the plaintiffs' wrongful search, arrest and detention by the defendants was against art. 5(1) of the Federal Constitution ("FC") as it E was not in accordance to the law. The defendants were wrong pertaining to the arrest without warrant whereby plaintiffs claimed that it was not following the procedures as laid down in s. 23(1)(a) of the Criminal Procedure Code ("CPC").

The Defendant's Case

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[14] On the other hand, the defendants submitted as follows:

(i) defendants had classified plaintiffs' case for investigation of an offence under Act 670 and that all the investigation and arrest were conducted in accordance to the laws. The arrest and detention were lawful on the G reason that the defendants were given power to arrest without warrant pursuant to s. 29 of the Act 670 and s. 23(1)(a) of the CPC;

(ii) under s. 29(1)(b) of Act 670, to justify the arrest without warrant, the defendants only need to prove that there is reasonable suspicion of the plaintiffs being engaged in committing or attempting to commit or H abetting the commission of an offence under Act 670;

(iii) the FIR has disclosed a reasonable suspicion that the element of slavery or force labour exist with the presence of beating which happened on a few occasions and the first plaintiff's failure to pay Budi's wages for three months. In this regard, defendants argued that the gist of the FIR I contained some credible complaint by Budi indicating that:

(a) Budi was beaten by the second plaintiff on 5 April 2013;

(b) the beating had occurred several times;

(c) Budi's Indonesian friends/co-workers were also beaten;

(d) the beating was witnessed by the first plaintiff;

(e) his wages have not been paid for had not been paid by the first plaintiff; and

(f) he feared for his safety and fled the house;

(iv) it was submitted that the plaintiffs had failed to adduce any evidence indicating the exercise of bad faith on the part of the defendants. There is no fact to show that the acts of the defendants were oppressive and done with the intention to injure the first plaintiff; and

(e) it was further submitted since the arrest and detention were lawful, the defendants should not be held liable for any pain and sufferings of the first plaintiff.

Decision Of The High Court

[15] On 4 February 2019, at the conclusion of the trial, the learned HCJ found that the first plaintiff had succeeded in her claim and allowed the prayers namely:

(a) Pampasan ganti rugi ke atas tekanan mental dan fizikal, kehilangan pendapatan, reputasi yang terjejas, halangan dan kesusahan yang dialami yang mana ini akan ditaksir;

(b) Mahkamah walau bagaimanapun menolak prayer ini;

(c) Mahkamah membenarkan ganti rugi teladan atas jumlah RM100,000 yang mana ianya wajar dan munasabah;

(d) Mahkamah membenarkan kos tindakan atas jumlah RM15,000; dan

(e) Mahkamah juga membenarkan perintah dan relief yang lain yang difikirkan adil dan suaimanfaat.

[16] The learned HCJ was of the view as follows:

Isu: Sama ada report yang dibuat oleh Budi Hermawan ada menunjukkan (disclosed) satu kesalahan memperdagangkan orang di bawah seksyen 13(f) Akta 670

(a) Mahkamah telah meneliti dan mempertimbangkan keseluruhan keterangan yang ada, khususnya berkaitan dengan aduan yang dibuat oleh Budi Hermawan sendiri.

(b) Adalah jelas bahawa Budi Hermawan adalah seorang pekerja yang mempunyai permit kerja yang sah yang dikeluarkan oleh Pejabat Buruh dan pihak Imigresen Malaysia dan adalah seorang pekerja di Zaidah Songket. Permit kerja tersebut yang dikeluarkan oleh Jabatan Imigresen Malaysia tidak pernah disiasat dan juga dicabar oleh pihak Defendan-Defendan.

A (c) Tiada sebarang keterangan yang menunjukkan bahawa Budi Hermawan dan pekerja-pekerja Indonesia yang lain yang bekerja dengan Zaidah Songket adalah pendatang-pendatang asing yang mana pengekalan tenaga kerja oleh Plaintif Pertama ke atas pengadu dan pekerja-pekerja yang lain adalah dibuat secara tidak sah.

B (d) Ini bermakna tidak timbul soal paksaan sepertimana yang diperuntukkan melalui Seksyen 13(f) Akta 670. Oleh itu, Plaintif Pertama tidak seharusnya ditahan atau disambung reman, memandang pengadu serta pekerja-pekerja Indonesia yang lain punyai permit kerja yang sah dan juga pekerja yang sah mengikut undang-undang Imigresen.

C **Isu: Sama ada Defendan-Defendan atau setiap orang dari mereka telah mengambil tindakan yang salah dengan menyalahgunakan kedudukan dan kuasa mereka dan/atau melampaui kuasa dan/atau dengan niat salah (*mala fide*) dari segi undang-undang dengan melakukan tangkapan dan penyiasatan ke atas Plaintif Pertama. Sama ada penangkapan dan**
D **penahanan Plaintif Pertama adalah sah di sisi undang-undang mengikut peruntukan Akta 670.**

(e) Daripada keterangan, jelas bahawa Defendan Pertama boleh melakukan siasatan ke atas Plaintif Pertama tanpa perlu mendapatkan perintah tahanan reman atau pun perlanjutan perintah
E reman tersebut oleh kerana Plaintif Pertama telah pun memberikan kerjasama dan hadir ke balai polis untuk memberi keterangan dan juga telah mengemukakan dokumen-dokumen sah pekerja-pekerja tersebut termasuklah pengadu.

(f) Apa yang perlu dibuat oleh Defendan Pertama adalah untuk melakukan siasatan lanjut di Jabatan Buruh Kuala Terengganu
F untuk menentukan sama ada dakwaan oleh pengadu dan pekerja-pekerja yang lain atas isu bayaran gaji boleh dibuat dengan mudah tanpa apa-apa keperluan untuk mendapatkan tahanan reman ke atas Plaintif Pertama.

(g) Apa yang berlaku di sini adalah kesalahan yang disyaki dilakukan
G yang telah dilaporkan oleh pengadu bukanlah suatu "seizable offence". Jika benarlah pengadu telah dipukul dan dicederakan oleh Plaintif Kedua ianya adalah satu kesalahan saman yang memerlukan siasatan (OTI) daripada pihak Timbalan Pendakwa Raya mengikut peruntukan Seksyen 323 Kanun Keseksaan.

H (h) Oleh itu tiada sebarang syak yang munasabah ke atas P1 di mana beliau telah melakukan satu kesalahan "seizable offence". Akibat daripada tangkapan dan penahanan yang berlanjutan ke atas Plaintif Pertama, beliau telah mengalami tekanan perasaan yang memerlukan rawatan dimana ini telah disahkan oleh doktor pakar (SP4).

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(i) Keterangan SP4 menyatakan bahawa P1 mengalami "acute stress disorder with depressed mood". SP4 menyatakan walaupun Plaintif Pertama pernah mempunyai sejarah "major depressive disorder" lebih kurang 20 tahun yang lalu, P1 adalah "well and functional" sehingga bulan April 2013. Di mana Plaintif Pertama ditahan polis selama satu minggu dan selepas itu, Plaintif Pertama menjadi "very traumatized and anxious".

(j) Tekanan perasaan yang dialami oleh Plaintif Pertama jelas dilihat sewaktu perbicaraan di mana P1 sering menangis dan meracau-racau sewaktu memberi keterangan. Perbicaraan terpaksa ditangguhkan berkali-kali dan Plaintif Pertama pernah terjatuh daripada kerusi saksi semasa memberi keterangan.

(k) Mahkamah mendapati kesan tekanan perasaan yang dialami oleh Plaintif Pertama ini adalah akibat secara langsung daripada penahanan salah yang telah dilakukan oleh Defendan-Defendan.

The Appeal

[17] The Appeal No. 108 by the first plaintiff is premised on the following grounds:

(a) Dalam semua hal keadaan kes ini, Yang Arif Hakim Mahkamah Tinggi Kuala Terengganu yang bijaksana telah silap dari segi fakta dan undang-undang apabila gagal untuk memutuskan bahawa Kuala Terengganu Report No. 4787/13 yang dibuat oleh Pengadu Budi Hermawan (No. Pasport: A 1505468) tidak menunjukkan (disclose) satu kesalahan pemerdagangan orang dibawah seksyen 13(f) Akta 670.

(b) Dalam semua hal keadaan kes ini, Yang Arif Hakim Mahkamah Tinggi Kuala Terengganu yang bijaksana telah silap dari segi fakta dan undang-undang apabila memutuskan bahawa penangkapan dan penyiasatan yang dijalankan ke atas Perayu/Plaintif Kedua telah mematuhi peruntukan Kanun Acara Jenayah.

(c) Dalam semua hal keadaan kes ini, Yang Arif Hakim Mahkamah Tinggi Kuala Terengganu yang bijaksana telah silap dari segi fakta dan undang-undang apabila gagal membuat dapatan bahawa arahan untuk membuka kertas siasatan atas kesalahan seksyen 13(f) Akta 670 tidak mempunyai asas dari segi undang-undang.

(d) Dalam semua hal keadaan kes ini, Yang Arif Hakim Mahkamah Tinggi Kuala Terengganu yang bijaksana telah silap dari segi fakta dan undang-undang apabila gagal membuat dapatan bahawa pada tarikh tangkapan dan seterusnya penyiasatan ke atas dijalankan, Budi Hermawan yang tersebut telah dibuktikan atau ada sebab untuk mempercayai adalah bukan 'orang yang diperdagangkan' menurut takrifnya dibawah Akta 670.

(e) Dalam semua hal keadaan kes ini, Yang Arif Hakim Mahkamah Tinggi Kuala Terengganu yang bijaksana telah silap dari segi fakta dan undang-undang apabila gagal membuat dapatan bahawa pegawai-pegawai penyiasat polis dan pegawai pelindung yang dilantik di bawah Akta 670 telah gagal menjalankan siasatan masing-masing dan telah gagal menyediakan satu laporan untuk dikemukakan laporan tersebut kepada Majistret bagi maksud menentukan sama ada Budi Hermawan yang tersebut adalah orang yang diperdagangkan sebagaimana yang dikehendakki oleh peruntukan seksyen 51 Akta 670.

(f) Dalam semua hal keadaan kes ini, Yang Arif Hakim Mahkamah Tinggi Kuala Terengganu yang bijaksana telah silap dari segi fakta dan undang-undang apabila gagal memberi pertimbangan dan membuat dapatan bahawa Majistret yang mengeluarkan Perintah Perlindungan Interim yang tersebut telah kemudiannya tidak ada membuat apa-apa dapatan bahawa Budi Hermawan yang tersebut adalah orang yang diperdagangkan dan/atau lain-lain perintah berkaitan.

[18] In Appeal No. 748, the defendants' appeal is premised on the following grounds:

(a) Yang Arif Hakim Mahkamah Tinggi yang Bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila pada mulanya mendapati bahawa tangkapan dan tahanan adalah teratur dan permohonan untuk salah tahan dan salah tangkap ditolak tetapi kemudian mengarahkan Defendan-Defendan membayar ganti rugi-ganti rugi dan kos kepada Plaintif Pertama.

(b) Yang Arif Hakim Mahkamah Tinggi yang Bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa Defendan-Defendan hendaklah membayar Ganti rugi Am ke atas tuntutan Plaintif Pertama di atas tekanan mental dan fizikal, kehilangan pendapatan, reputasi terjejas, halangan dan kesusahan yang dialami yang akan ditaksirkan oleh Pendaftar Mahkamah sedangkan liabiliti diputuskan memihak kepada Defendan-Defendan.

(c) Yang Arif Hakim Mahkamah Tinggi yang Bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa Defendan-Defendan hendaklah membayar ganti rugi Kehilangan Pendapatan sedangkan Plaintif Pertama telah gagal untuk membuktikan ganti rugi tersebut melalui keterangan dokumen ketika perbicaraan di Mahkamah Tinggi.

(d) Yang Arif Hakim Mahkamah Tinggi yang Bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila membenarkan ganti rugi teladan atas jumlah RM100,000.00 untuk dibayar oleh Defendan-Defendan kepada Plaintif sedangkan liabiliti diputuskan memihak kepada Defendan-Defendan dan ianya jelas bertentangan dengan prinsip undang-undang berkenaan pemberian Ganti rugi Teladan.

(e) Yang Arif Hakim Mahkamah Tinggi yang Bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan kos tindakan sebanyak RM15,000.00 yang mana ianya adalah terlalu tinggi dan melampau (excessive) bagi maksud tindakan ini.

(f) Yang Arif Hakim Mahkamah Tinggi yang Bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila membenarkan tuntutan Plaintif Pertama bagi ganti rugi ke atas tekanan mental dan fizikal, kehilangan pendapatan, reputasi terjejas, halangan dan kesusahan yang dialami sedangkan pihak Plaintif Pertama telah gagal membuktikan kausa tindakan berasaskan tort salah tangkap dan salah tahan terhadap Defendan-Defendan sebagaimana yang diputuskan oleh YA Hakim Mahkamah Tinggi.

(g) Yang Arif Hakim Mahkamah Tinggi yang Bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa tekanan mental yang dihidapi oleh Plaintif Pertama adalah akibat daripada tangkapan dan penahanan oleh pihak polis sedangkan keterangan yang dikemukakan dalam perbicaraan di Mahkamah Tinggi menunjukkan sebaliknya.

(h) Yang Arif Hakim Mahkamah Tinggi yang Bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa tekanan mental yang dihidapi oleh Plaintif Pertama adalah akibat daripada tangkapan dan penahanan oleh polis dengan hanya berdasarkan kepada keterangan Dr. Ishwary Damodaran (SP4) sahaja tanpa melihat kepada keseluruhan keterangan saksi-saksi Defendan-Defendan.

(i) Yang Arif Hakim Mahkamah Tinggi yang Bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila gagal memutuskan bahawa Plaintif Pertama telah gagal membuktikan keseluruhan kesnya terhadap Defendan-Defendan.

Submissions

[19] Counsel for the first plaintiff submitted that first plaintiff was faced with unreasonable search by the defendants at the first plaintiff's premises. Besides, there is no reasonable cause to arrest and detain first plaintiff on remand for seven days. In this regard, it was argued by the first plaintiff that there is nothing done by first plaintiff that shows the act of acquiring or maintaining the labour or services of a person through coercion which warrant her arrest under Act 670. Budi is a legal employee with work permit to work with the first plaintiff.

[20] The wrongful arrest and detention had caused mental distress to the first plaintiff which entitled the first plaintiff to damages.

[21] At the outset of the hearing, learned counsel for the defendant informed the court that he would be relying on three issues in these appeals as follows:

A (i) Were the arrest, detention and investigation done with reasonable and probable cause?

(ii) Did the defendants wrongly or exceedingly use their powers with bad faith in arresting and investigating the first plaintiff?

B (iii) Were the defendants liable for damages in consequence of all act by the defendants against the first plaintiff?

[22] Defendants submitted that the arrest and detention were lawful which had been done in accordance to the law. It was made with reasonable and probable cause. In this regard, the defendants argued that this is not a C criminal trial which demands the defendants to prove every single element required under the provision of law that an accused is investigated or charged with. What is of significance is that, since this is claim of damages for wrongful detention and allegations of bad faith on the part of the defendants, the core issue is whether the pleaded case of tort of wrongful detention or D other causes of action have been successfully proven by the first plaintiff.

[23] Therefore, it is submitted that the learned judge had taken the wrong consideration in making a determination of the necessity of the arrest. Precisely, what demands the determination of the High Court was whether there was reasonable and probable cause for the defendants to arrest the first E plaintiff.

[24] On the first issue, the test to determine if an arrest is warranted depends on whether the defendants had at the material time reasonable suspicion of a seizable offence having been committed in causing the arrest. In this regard it was submitted that the learned HCJ had made an error. The F contents of the first information report ("FIR") cannot be the sole yardstick to ascertain the legality of the arrest and detention. The entire event from the moment the report was lodged till the end of the detention needs to be considered as a whole.

G **[25]** On the second issue. Defendants submitted that the first plaintiff had failed to adduce any evidence indicating the exercise of bad faith on the part of the defendants. Proving bad faith requires the first plaintiff to prove that the act was intentionally done with malice. There is no evidence to show that the acts of the defendants were oppressive and done with the intention to injure the first plaintiff.

H **[26]** On the third issue, defendants submitted that the damages sought for the pain and sufferings of the first plaintiff as a result of the arrest and detention of the first respondent should not arise. Since, it has been submitted above that the arrest and detention were lawful, the defendants should not be held liable for any pain and sufferings of the first plaintiff.

I

[27] The learned HCJ was of the view that the defendants may investigate the first plaintiff without remanding her. The learned HCJ was of the further view that since the first plaintiff had given her cooperation, therefore, the remand order was unnecessary. In this regard, the defendants submitted that this was merely His Lordship's personal opinion. There was indeed a reasonable complaint based on the FIR by Budi as well as reasonable suspicion on the part of the defendants that the first plaintiff may have committed an offence under s. 13(f) of the Act 670. The learned HCJ should direct his mind on the legality of the whole arrest and detention of the first plaintiff to determine if the defendants were liable for the mental distress of the first plaintiff. Since, it was held that the arrest and detention were lawful, the defendants should not be held liable at all.

[28] The defendants at the material time were merely executing their duties in accordance with the law. It is relevant to note the fact that the detention which was as a result of the remand order pursuant to ss. 117 and 119 of the Criminal Procedure Code was not challenged by the first plaintiff. The remand order was also a judicial act which the defendants had to execute.

[29] Besides, it was also argued by the defendants that it is a well-settled principle of law that a party must show the causative element of damages. When no tort (wrongful arrest and wrongful detention in the instant case) has been established against the defendants, it is entirely impossible to link the defendants to any possible damages suffered by the first respondent. What transpired at the material time was merely a normal arrest and detention for the purpose of an investigation. In the instant case, the first plaintiff had failed to prove that the arrest and detention were not ordinary ones which might trigger mental distress or any other kinds of mental pressure on the detainee.

[30] The first plaintiff was said to have failed to prove that she had fully recovered from her illness 20 years ago. When her illness was still there, there was still a possibility that there was chance for the past illness to recur or contribute to her mental distress as alleged by the first plaintiff. Further, SP4 had not made any conclusive findings that the mental distress suffered by the first plaintiff was as a result of the arrest and detention. Though SP4 said that there was no link between the first plaintiff's past illness and her current illness, SP4 testified that if one has suffered major depression disorder (MOD), there is a chance for re-occurrence if he or she faces significant stress. It is clear from the evidence that the mental distress suffered by the first plaintiff was also contributed by her past illness as there was a risk for relapse if she suffers stress in the future.

[31] It is also submitted by the defendants that the award for damages for the loss of income claimed by the first plaintiff was wrong in law. This is in view of the fact that the loss of income was not supported by any

documentary evidence. The first plaintiff in her witness statement claimed that she had to close down her factory and lost her source of income. She also claimed that she could not perform her contract with Jakel Trading and Omar Ali Holdings. Defendants submitted that this amounts to bare assertions without being supported by any documentary evidence. Nothing was produced at the trial to corroborate any of the first plaintiff's claim. The first plaintiff also failed to establish the cause of the alleged loss of income and/or the link between the arrest/detention and the alleged loss of income.

[32] Defendants also submitted that the learned HCJ had erred when awarding exemplary damages for the sum of RM100,000 to the first plaintiff. Such award is wrong in law.

[33] Another point submitted by the defendants is that the costs awarded to the first plaintiff for the sum of RM15,000 is excessive. The discretionary power given by law needs to be exercised sparingly by taking into considerations the above factors before awarding costs. The main factor to be considered is the level of complexity of the case. Defendants contended that the case before the High Court is quite straightforward where the main issue pertaining to liability is only whether the arrest and detention of the first plaintiff was lawful. It is clear as daylight that there was no other cause of action pleaded. The trial before the High Court was very centered and focused. The level of complexity of this case is certainly not at par with a complex commercial dispute or any other cases requiring the expert from numerous fields to assist the court, in which awarding a high costs might be justifiable. Therefore, it was submitted by the defendants that the award of costs for the sum of RM15,000 should be set aside.

Our Decision

[34] The traumatic experience for the first plaintiff began when one of her employees, Budi made a police report on 6 April 2013 *vide* Kuala Terengganu Report No.: 004787/13 at about 13:46 hours (1.46pm) wherein the pertinent part of the report could be summarised as follows: "alleged that he was assaulted by fist and kicked by the younger brother of the first plaintiff whom was known as 'MAT'. He had also alleged that he was scolded for no apparent reasons and inconsequence thereof he suffered injuries to his scrotum, his back and face. He had also alleged that he was not paid the salary for three months from January 2013 to March 2013. This frequently happened to him and four of his friends. Each time it happened, it was witnessed by the first plaintiff. The complainant (Budi Hermawan) further said that he was determine to run away without his valid travel documents for fear of his safety". The police report by Budi was marked as exh. P12.

[35] On 8 April 2013 the first defendant (Insp Rabiatul Adawiayah) made a police report that at about 8.30am she received report P12 from Budi and upon initial investigation had classified the report as a case under Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ("ATIPSOM").

[36] On 8 April 2013, ASP Mohd Faizal bin Ahmad Tajudin arrested the second plaintiff and an Indonesian at an address 1303-A, Lorong Kemunting, Pasir Panjang, Kuala Terengganu.

[37] The first plaintiff was arrested on the same day, 8 April 2013 on suspicion of having committed an offence under s. 13 of the ATIPSOM which states *inter alia* as follows:

> **Offence of trafficking in persons by means of threat, force, etc**
>
> 13. Any person, who traffic in persons not being a child, for the purpose of exploitation, by one or more of the following means:
>
> (a) threat;
>
> (b) use of force or other forms of coercion;
>
> (c) abduction;
>
> (d) fraud;
>
> (e) deception;
>
> (f) abuse of power;
>
> (g) abuse of the position of vulnerability of a person to an act of trafficking in person; or
>
> (h) the giving or receiving of payments or benefits to obtain the consent of a person having control over the trafficked person
>
> commits an offence and shall on conviction, be punished with imprisonment for a term not less than three (3) years but not exceeding twenty (20) years, and shall also be liable to fine.

[38] The court was of the view that the police report made by Budi did not disclose any offence under s. 13(a-h) of the ATIPSOM against the first plaintiff. Budi was at the material time employed by the plaintiff with proper and valid work permit issued by the Labour Department and the Immigration Department. The defendants did not challenge or verify this assertion. It was in evidence that part of his salary about RM300 was sent to his wife named Siti Muzaroah in Indonesia and the balance was given to Budi. Naturally, what he received would be less than what he should have received if part of his salary was not sent to his wife. There is no basis to complain that he was not paid for more than three or four months. It was

also not disputed through the evidence of the first defendant that Budi would be paid on per job basis, meaning that he would be paid once the weaving of the songket was completed.

[39] There was also no material before the court that Budi and the other four Indonesian workers employed by the first plaintiff were forced or coerced into working with the first plaintiff by fraud, deception or under any of the items stipulated in s. 13(a) to (h) of the ATIPSOM.

[40] There was evidence to show that it was the Indonesian employees of the first plaintiff who had created a sense of mistrust in the relationship between employer and employees, and this included Budi. This could be seen from the incident on 4 February 2013 prior to the date of the alleged ill-treatment report by Budi on 6 April 2013. The first plaintiff had made a police report against four of her employees who were given leave to go to Johor Bahru from 25 January 2013 to 31 January 2013 but failed to come back for work after their leave had expired. The first plaintiff made a police report on 4 February 2013 *vide* Chendering Report No.: 000145/13 at 1.15pm wherein the contents of the said report *inter alia* stated that the first plaintiff had asked her driver to send four of her workers to the bus station to board a bus to Johor Bahru as they were given four days leave. However they failed to return to work after their leave had expired. Efforts to get in touch with them was futile. The first plaintiff also stated in her police report that she intent to report the matter to the Immigration Department and did not want to be responsible for any untoward incident which might happen to them.

[41] The first defendant as an investigating officer failed to take into account of the earlier police report made by the first plaintiff with regard to the four Indonesian workers. Had the first defendant considered the prior report lodged by the first plaintiff, it would show that the police report made by Budi was unfounded or at the very least not credible and was made with malice or ulterior intent.

[42] The court was of the view that there was no necessity for the police to arrest and detain the first plaintiff as there was nothing to implicate the first plaintiff with any offence under ATIPSOM. At best, the first plaintiff should be categorised as potential witness on possible charges to be preferred against the second plaintiff. The second plaintiff was charged under s. 323 of the Penal Code but was subsequently given a discharge not amounting to an acquittal (DNAA) by the prosecution.

[43] The court has had sight of the Investigating Diary (Kertas Siasatan) No.: KT/JSJ/KS 00565/13 dated 9 April 2013 at 10am in seeking for the first remand order from the learned Magistrate which states as follows:

On 6.4.2013 at 1506 hours the I.O of the case recorded statement from A1-Budi Hermawan where he stated that he had come to Malaysia since 7.12.2011 and had a valid work permit with the 1st Plaintiff's company' Zaidah's Songket'. He further stated that he stayed with his employer until December 2012. Since January, 2013, he was assaulted by the 2nd Plaintiff named 'Mat'. Budi Hermawan further stated that because he could not stand the ill-treatment received and alleged that the 1st Plaintiff had scolded and slapped him and the other Indonesian workers. He also stated that he was not happy with the salary which he and the other co-workers received and had not been paid since January, 2013 until the date of the incident.

[44] It is interesting to note that in the police report made by Budi, which was tendered as P12, there is no mention that the first plaintiff had slapped and scolded Budi.

[45] In the circumstances, the first defendant being the investigating officer ought to have objectively analysed the facts to make a proper and valid judgment that it was unnecessary to arrest and detained the first plaintiff. However, the first defendant had failed to do so, resulting in the unlawful arrest and detention of the first plaintiff. We find that there were no credible information before the first defendant for any reasonable suspicion to arise that the first plaintiff had committed a seizable offence under ATIPSOM, or for that matter under any other statute. Budi was legally in the country with full and valid documents of employment by the first plaintiff. Therefore, it begs the question how the first defendant could have deduced that Budi a person who had been trafficked into the country and thus be an offence for which the powers of arrest under s. 29 of the Act 670 or s. 23 of the Criminal Procedure Code can be exercised. The complaint of alleged assault was made by Budi was against the second plaintiff, and that too is a non-seizable offence. We find that no reasonable complaint has been made or credible information has been received or a reasonable suspicion exists for the first plaintiff to be arrested and detained in respect of a seizable offence.

[46] The first defendant had on 14 April 2013 applied for a second remand order from the Magistrates' Court but was only granted an extension of one day remand until 15 April 2013. What is interesting to note that in the application for the second remand order, the first defendant under the "alasan permohonan" did not indicate the reason for second remand order. For ease of reference the "alasan permohonan" for the second remand order is reproduced herewith.

* Menjalankan Siasatan Dan Risikan Jenayah.

* Mengesan Saksi-saksi Awam Dan Rakam Percakapan.

* Mengesan Mangsa-mangsa Lain Dalam Kes Ini.

A * Mendapatkan Dokumen-dokumen Berkaitan.

* Membuat Kawad Cam.

* Merujuk Kepada Agensi/Jabatan Lain Bagi Pengesahan Pasport, Majikan Dan Sebagainya.

B – Bimbang Bukti Akan Dihapuskan Sekiranya Saspek Dibebaskan Sebelum Siasatan Diselesaikan.

– Merujuk Ke YA TPR.

[47] Clearly, it could be seen that in the second remand application, the first defendant did not bother to tick the box under which reason(s) the C extension for remand was sought. Although the learned Magistrate had only allowed a further extension for remand for one day but the point here is that there was no justification at all for the first defendant to even apply for a further remand without indicating under which reasons it was sought. This is indicative of a clear abuse of power by the first defendant to further detain D the first plaintiff.

[48] It was submitted by the defendants that the learned HCJ did not make any finding whether the arrest and detention was unlawful but considered the arrest and detention unnecessary.

E **[49]** The court was of the considered view that notwithstanding the learned HCJ's failure to make any finding as to whether the arrest and detention of the first plaintiff was unlawful or otherwise, there is ample and sufficient evidence to conclude that the first plaintiff's arrest and detention was unlawful. This could be gleaned from the fact that the police report lodged F by Budi did not specifically refer to the first plaintiff. The assault as claimed by Budi was allegedly perpetrated by the second plaintiff and not the first plaintiff. Furthermore, Budi had stated that he had come to Malaysia in 2011 and up to the time of the alleged incident in April 2013, he had been with the first plaintiff for almost more than two years. If the first plaintiff had ill-treated Budi immediately after being employed as her worker, he would not G have lasted this long working for the first plaintiff. Budi's report to the police is the first in his two years of working for the first plaintiff.

[50] There was nothing apparent in the instant case that could be construed as an "exploitation" as envisaged in s. 2 of the ATIPSOM, be it in the form of sexual exploitation, forced labour or services, slavery or practices similar H to slavery, servitude, any illegal activity or the removal of human organs.

[51] It has been canvassed by the defendants that this is not a criminal trial which demands the defendants to prove every single element required under the provision of the law that an accused is investigated and charged with. I That may be so, but in a claim for wrongful arrest and detention, it is

incumbent upon the defendants to show that there was credible information giving rise to reasonable suspicion of a seizable offence having been committed or attempted to be committed that warranted the arrest and detention.

[52] The point to be made here is that it is perfectly within the power of the police to investigate the alleged crime committed but the issue at hand is given the scenario was it necessary for the police to have arrested and detained the first plaintiff when it was shown that the report by Budi was directed at the second plaintiff and not at the first plaintiff. Furthermore, it was also shown that the first plaintiff had fully cooperated in the investigation.

[53] The provision in s. 29 of the ATIPSOM states as follows:

> **Power of arrest**
>
> 29(1) An enforcement officer **may arrest** without warrant any person:
>
> (a) found committing or attempting to commit or abetting the commission of an offence under this Act; or
>
> (b) whom the enforcement officer reasonably suspects of being engaged in committing or attempting to commit or abetting the commission of an offence under this Act. (emphasis added)

[54] It is instructive to note that there is an exercise of discretion in s. 29 of the ATIPSOM whether the police may arrest the first plaintiff with or without warrant. And that discretion must be exercised in accordance to the law. In order words, there was no necessity for the police to arrest the first plaintiff for purposes of investigation. The first plaintiff has indicated her willingness and cooperation in the investigation and had indeed fully cooperated with the police when she was called to the station to give her statement and subsequently for her other Indonesian workers to be brought to the station for enquiry and recording of their statements.

[55] Similar provision with regard to the exercise of discretion whether to arrest or not is also found in para. 23(1)(a) of the Criminal Procedure Code where it states as follows:

> 23. When police or penghulu **may** arrest without warrant
>
> (1) Any police or penghulu **may** without an order from a Magistrate and without a warrant arrest:
>
> (a) any person who has been concerned in any offence committed anywhere in Malaysia which is a seizable offence under any law in force in that part of Malaysia in which it was committed or against whom a reasonable complaint has been made or **credible information has been received** or a reasonable suspicion exists of his having been so concerned. (emphasis added)

[56] In this regard, the court was of the view that the first defendant would have had in her possession at the material time credible information that Budi had a valid work permit and based on the police report made by him would reveal that the first plaintiff had nothing to do with what was alleged in his police report. The alleged culprit was the second plaintiff and there was no necessity for the first plaintiff to be arrested and detained.

[57] The court is appraised of the decision in *Hassan Marsom & Ors v. Mohd Hady Ya'akop* [2018] 7 CLJ 403 cited by learned counsel for the defendants. The issues that arose in *Hassan Marsom* (*supra*) for the court's adjudication were (i) whether the arrest of the respondent was lawful; (ii) whether the detention of the respondent under the remand order was valid; (iii) the protection afforded under s. 32 of the Police Act 1967; (iv) whether the remand order under s. 117 of the Criminal Procedure Code ("CPC") may be challenged by a collateral proceeding; and (v) the exemplary damages.

The Brief Facts Are As Follows

The respondent accompanied his friend (SP4) who received a telephone call asking him to come over to the Police Contingent Headquarters Melaka. In the telephone conversation, SP4 was asked whether he was involved in a fight involving a police officer ('the fight'). SP4 went in to see the first appellant while the respondent waited at the guardhouse. Half an hour later, the respondent was brought into the second appellant's room and he was blindfolded, stripped and assaulted despite his denial on his involvement in the fight. In the morning, the respondent was produced before the Magistrate for a remand order under s. 117 of CPC. A remand order for a period of seven (7) days from 22 November 2008 to 29 November 2008 was obtained from the Magistrate by the 3rd appellant. The respondent was brought to the lock-up. Following the injuries suffered, the respondent was brought to the hospital. While still at the hospital, on 28 November 2008, the respondent's remand order was extended for another seven (7) days until 5 December 2008. Police investigation later revealed that the respondent was not involved in the fight and no charges were brought against him. Resulting from the assault the respondent suffered injuries, shortness of breath and chest pain. The respondent commenced an action against the appellants at the High Court, (i) claiming for general damages and exemplary and/or aggravated damages for unlawful detention and pain and suffering he had undergone, and (ii) seeking a declaration that his detention between 22 November 2008 and 5 December 2008 was unlawful and his rights under art. 5 of the Federal Constitution had been breached.

[58] It is pertinent to note that in the instant appeal, the issue of whether the arrest and detention was lawful or otherwise was pleaded and canvassed before the High Court unlike in *Hassan Marsom* where the initial arrest was not an issue.

[59] We echoed the sentiment expressed by the Federal Court in *Hassan Marsom* (*supra*) at para. [36] of the judgment and could do no better except to quote *in extenso* the relevant passage as follows:

> [36] ... whether there was wrongful arrest or not depends on whether the police had reasonable or probable cause to effect the arrest on the respondent which depends on whether the police had credible information or held reasonable suspicion as to the commission of the offence. The case of *Masa Nangkai & Ors v. Sgd Edwin Nancha & Anor* [2004] 1 LNS 495; cited in the Court of Appeal's judgment explains the requirements of s. 23 of the Criminal Procedure Code on such power of arrest by the police. (See also: *Saul Hamid Pakir Mohamad v. Inspektor Abdul Fatah Abdul Rahman & Anor* [1999] 1 LNS 83).

[60] The High Court in *Masa Nangkai & Ors v. Sgd Edwin Nancha & Anor* [2004] 1 LNS 495 held as follows:

> where the court held that the question whether there was wrongful arrest and detention would very much depend on whether the police had acted within the provision of section 23(1)(a) of the CPC and to rely on that section the police had to show they had reasonable or probable cause to effect the arrest in that they had received credible information or held a reasonable suspicion as to the commission of an offence. It was argued that a similar criterion applied when applying for a remand order to facilitate further investigation.

[61] In the instant appeal both the issues of initial arrest and subsequent detention under s. 117 of the CPC had been argued by the parties and from the decision of the learned HCJ no finding of fact was made on whether the arrest and detention was lawful. The learned HCJ merely held that the detention of the first plaintiff was unnecessary.

[62] It is pertinent to note that for purposes of this appeal, s. 23 of the CPC and s. 29 of the ATIPSOM are relevant with regard to the powers of a police officer to arrest without an order of a Magistrate or without a warrant.

[63] In this regard, whether the arrest and detention of the first plaintiff was wrongful would very much depend on whether the defendant had acted within the provision of s. 23(1)(a) of the CPC and/or s. 29 of the ATIPSOM. In order for the defendants to rely on that section the defendants had to show they had reasonable or probable cause to effect the arrest in that the defendants had received credible information or held reasonable suspicion as to the commission of an offence. We are of the view that a similar criterion applied when applying for a remand order to facilitate further investigation.

[64] The court is of the considered view that with regard to the arrest of the first plaintiff, there was sufficient credible information available to the first defendant at the material time when the first plaintiff gave her statement to the first defendant on the night of 6 April 2013 and also in the light of the

earlier report made by the first plaintiff on 4 February 2013 and the report made by Budi on 6 April 2013 would show that the first plaintiff has not committed any offence under s. 13(1)(a-h) of ATIPSOM or under s. 323 of the Penal Code, or for that matter any seizable offence. Hence, there was no credible information or reasonable suspicion that the first plaintiff was a "person who has been concerned in any offence committed anywhere in Malaysia which is a seizable offence under any law in force in that part of Malaysia in which it was committed or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned". The exercise of the power of arrest under s. 29 of the ATIPSOM or s. 23(1)(a) of the CPC is discretionary. The first defendant could have asked the first plaintiff to come to assist in the investigation at any time when required. The first plaintiff had informed the first defendant that she had a child and this is noted in the application for the first remand order. It was also noted in the application for remand that the salary of Budi was based on the completion of weaving of songket. Hence, even if there was a dispute as to the payment of salary, it was a contractual dispute between Budi and the first plaintiff, and is not indicative of commission of any criminal offence for which the power of arrest is exercised for the purposes of investigations.

[65] In view of the foregoing, we are constrained to hold that the arrest was unlawful notwithstanding that the learned HCJ's failure to make a finding on this issue, for the evidence is aplenty in support of the first plaintiff's case.

[66] On the issue of detention pursuant to a remand order by the learned Magistrate for seven days from 9 April 2013 to 14 April 2013 and the second remand order for one day till 15 April 2013.

[67] The claim by the first plaintiff against the defendants is also based on unlawful detention. The defendant contended that the detention was lawful whereas the first plaintiff alleges otherwise.

[68] It is instructive to note that whether the remand orders had been obtained from the Magistrate upon sufficient cause being shown or whether the judicial officer concerned had been misled in issuing the same has to be determined by the court.

[69] Strict compliance with the provision of s. 117 of the CPC has been vividly explained by KC Vohrah J (as he then was) in the case of *In Re The Detention Of S Sivarasa & Ors* [1997] 1 CLJ 471. The brief facts as summarised are as follows:

> On 9 November 1996, 67 people were arrested by the police in an alleged demonstration which took place at Asia Hotel, Kuala Lumpur. The suspects were remanded under s. 117 of CPC from 10 November 1996 till 13 November 1996. An application was then made to the Magistrate for

an extension of the detention period of ten (10) suspects under s. 117 of CPC for another ten (10) days ie from 13 November 1996 until 22 November 1996. Under the heading 'Alasan-Alasan' in the application, it was indicated, *inter alia*, that the application had to be made as the detention period was too short and was insufficient for the police to complete investigation. The Magistrate stated that at the end of her notes of proceedings that she was satisfied with the reasons as appeared in the application, and also in the investigation diary that was given. She went on to allow the application for the extension of detention. Apparently, the investigation diary that had been referred to by the Magistrate consisted of three (3) sheets of typewritten paper, which had the heading 'Pergerakan Soalsiasat Tahanan' and a timetable of when the ten (10) suspects were being taken out from and being sent back to the cells where they were detained.

In the afternoon of 13 November 1996, an urgent application for revision of the Magistrate's remand order under s. 323 of CPC was filed in the High Court. The complaint was that the omnibus remand order made on the ten (10) persons by the Magistrate was not in compliance with s. 117 CPC.

The learned judge held *inter alia* that the application for extension of detention was an omnibus application for the detention of ten (10) named persons, and there was no condescension to details as to what each of them was arrested for and why it was necessary to extend the remand of each of them. Whatever vague reasons shown on the application (which did not show any nexus between the suspects and a suspected offence or offences) for the continued detention of each of them were without any foundation.

[70] The court was of the considered view that as for the application for the first and second remand orders, no application was made by the first plaintiff to challenge the validity of the remand order by the learned Magistrate, the court is not prevented from examining the evidence in the appeal record and make its own finding as the appeal is considered as a re-hearing.

[71] As for the application for the second remand order, the court was of the view that the extension of remand of one day till 15 April 2013 for the first plaintiff, the learned Magistrate had noted that the extension for remand was granted on the basis as stated in the "alasan permohonan di para. (2)" which the first defendant as an investigating officer did not tick or indicate under which reasons the application for extension for remand was made. Clearly, the first defendant did not follow strictly the requirements as stipulated in s. 117 of the CPC.

Conclusion

[72] Based on the reasons as adumbrated above and in all the circumstances, it is our unanimous decision that in respect of Appeal No. 108, we find there is sufficient evidence for the learned HCJ to have made the findings that the arrest and detention of the first plaintiff was wrongful. This especially so when he made the award of damages. Even though there is no specific finding in this regard, a perusal of the grounds of judgment in paras. [15], [72] and [23] would lead to an irresistible conclusion that the arrest and detention of the first plaintiff was wrongful. Hence, we find that the order dated 4 February 2019 in prayer (b) cannot be justified and set aside. We ruled that the arrest and detention was unlawful. This is particularly so when prayers (a) and (c) were allowed. Therefore, we allowed Appeal No. 108 with costs and by substituting para. (b) of the order with para. (b) as prayed for in the statement of claim.

[73] Appeal No. 748 is dismissed with costs to the first plaintiff. We award costs of RM5,000 per appeal, that means we award costs of RM5,000 to the appellant/first plaintiff in Appeal No. 108 subject to allocator, and another RM5,000 to the respondent/first plaintiff in Appeal No. 748 and it is not subject to allocator.